

3/15/2023 – Senate Judiciary Committee
Senate Bill 79, An Act Relating to limitations on Hospital Liens

Introduction:

For the record, my name is Kristin Ross, and I am a partner at the law firm of Rousseau and Ross, in Lebanon, NH.

I graduated from Vermont Law School in 2009 and for the past 14 years have been exclusively representing injury victims in VT and NH.

I have been a member of the Vermont Association for Justice for approximately 11 years and will be serving as the organization President-elect later this year.

I am testifying in support of Senate Bill 79, An Act Relating to limitations on Hospital Liens.

I come to this committee with the benefit of having a cross-border practice in NH and VT.

I see how Vermont's hospital liens unfairly hurt Vermont citizens and why this is a bad way for hospitals to get paid.

I hope my perspective today is helpful to this committee's consideration of these important issues.

History of hospital liens:

Hospital lien laws first emerged in the 1930s when only 10% of Americans had health insurance.

The original purpose of lien laws was to help relieve the burden on hospitals from treating uninsured patients.

Things have changed quite a bit since the 1930s.

According to the Vermont Department of Health, in 2021, 97% of Vermonters were covered by health insurance. Only 3% of Vermonters were uninsured. Almost 50% of Vermonters get their health insurance through private health insurance. About 24% are enrolled in Medicaid. About 21% in Medicare.¹

Despite this, hospitals in Vermont are still filing liens, and not just when they treat uninsured patients.

¹ According to the United States census bureau, in 2021, 91.7 % of Americans had health insurance coverage at some point during the year. Only 8.3 % of Americans were uninsured. Employer- based insurance was the most common, covering 54.3% percent of the population. 18.9% of Americans were insured through Medicaid and 18.4% insured through Medicare.

Across Vermont, hospitals are refusing to bill their patient's health insurance and are using the lien system in a way it was never intended.

The lien process allows hospitals to ignore the discounts they are contractually required to offer health insurers.

This practice is most lucrative when it is used against low-income patients with Medicaid.

Even though Vermont is doing great with the percentage of people with health insurance, what many including hospitals don't understand is that most Vermonters are underinsured for liability and underinsured motorist insurance.

I am constantly faced with low limits and insufficient funds to cover my client's losses.

Policies with only \$25k are too common and these kinds of policies are most often purchased by low-income patients as they are the least expensive.

When hospitals lien rather than accept the patient's health insurance, they take away the funds that otherwise would go to the injured person for compensation for pain, suffering, or lost wages.

It's unfair to Vermonters:

Imagine you are on your way to work when a distracted driver runs a red light and crashes into you. You stay in the hospital overnight then are discharged the next day to begin your month-long recovery process.

You have a list of things you are worried about: how long is it going to take me to get better? How much sick time do I have at work? Without a paycheck, how can I keep up with my mortgage and car payments?

You are NOT thinking about getting a bill from the hospital. You gave them your health insurance information before you checked out. You have a good job and part of your benefits package is health insurance. You actually took a job with a lower hourly wage so you could get health insurance. At least you can exhaust that \$2,500 deductible, right? Wrong.

Under Vermont's current hospital lien statute, the hospital, not the patient, gets to decide whether to submit those bills to health insurance or try to recover more from a potential, future, liability claim. The patient has no say.

Hospitals even file liens when the patient never intended to bring a liability claim. This adds additional burdens to our otherwise over-taxed judicial system as it forces patients to hire attorneys or file lawsuits.

We had an 85-year-old Vermonter who had been t-boned and spent several days in the hospital. When she got home, she found out the hospital filed a lien, even though she had not intended to bring a liability claim or hire a lawyer. She told the hospital that she had Medicare,

supplemental insurance through AARP, and med pay benefits, but the hospital refused to bill any of her insurances and she had no choice but to hire us.

By comparison, NH recognizes that individual choice in how an accident victim uses their medical benefits is important. Under a NH statute, the patient, not the hospital, decides whether to bill private insurance or med pay. NH RSA 264:16 (“Medical Payments”).

If a Vermont citizen pays for health insurance, or has other state insurance, they should be able to use it regardless of how they came to need the medical treatment. This is especially true when someone has a high deductible health plan, and they are facing significant medical expenses.

The current lien statute is also unfair because it allows a hospital to take all but \$500 of an injury victim’s settlement.

The statute does not require that the hospital share in the costs that the injured person had to spend to act as the hospital’s collection agency.

In 2010, in the case of *Fletcher Allen Health Care v. Michael Clapp*, the Vermont court confirmed that, because the statute expressly states that the hospital has a right to recovery their full lien, minus \$500, the Court did not have the authority to intervene. Because of how this statute is written, the Court said the hospital did not have to share in the costs paid by the injured person to recoup the hospital’s money.

I am hoping you will change that.

Attorney David Ried, who practices in Windham County, asked me to share one of his client’s stories, which highlights these issues.

His client was run over by a car outside her home in VT and sustained life-threatening injuries. She was emergently transported by DHART helicopter from Brattleboro Memorial Hospital to Bay State. While at BMH, the patient was unconscious, but BMH coded the patient as “self pay” and filed a hospital lien of \$20k, despite the patient having both Medicare and BCBS. All other medical providers billed health insurance. The medical bills exceeded \$100k but there was only \$50K in liability insurance. Even after Attorney Ried explained there was not enough coverage, BMH still refused to submit the outstanding medical bills to health insurance for payment. They insisted on taking a disproportionately large portion of the \$50k and the patient who suffered life-threatening injuries was left with minimal recovery.

The statute has no legal mechanism for attorneys, or injured Vermonters, to go to Court and say, “help, this is unfair.”

Other states take fairness and equity into account. Vermont’s statute does not. The injured person has no bargaining power and no legal remedy.

It's a bad way to get paid:

It is difficult to understand why a hospital would turn down prompt payment from a health insurer and instead choose to hold out for a later payment, of an unknown amount, and based on a myriad of unknown other factors.

The Centers for Medicare and Medicaid Services warn hospitals about the risks involved with trying to collect payment from a liability claim. One of CMS's memo² to providers warns that "providers.... who do not file a Medicare claim once the "prompt period" has expired (and before timely filing has expired) run the risk that insurance proceeds will not be available or may be less than Medicare's payment would have been if Medicare had been billed.")

At the time hospital liens are filed, hospitals don't have details about the accident that brought the patient into their hospital. They just hear "car crash" and send out the lien. At this stage of a case, there are a myriad of unknown factors.

For example: how, exactly, did the crash happen? Is there valid liability insurance? How much coverage is there? Too many people have \$25k policies and most Vermonters don't have enough underinsured motorist coverage to fill in the gap.

There could be legal issues like immunities, assumption of the risk, or comparative fault issues.

What other liens will there be that must be paid out of any recovery? Short term disability liens? Long term disability liens? Other health insurance liens? Child support liens? Tax liens?

It can be years before all these issues are flushed out and all factors are understood.

But by this point, it's too late to bill the patient's insurance so what happens? Does someone who has been out of work for six months not recover their lost wages because all of the recovery, save \$500, goes to the hospital? Does the hospital right off charges, even though it could have been paid by health insurance three years sooner? Is the patient stuck with unpaid medical bills, bad credit, and bankruptcy despite having had health insurance coverage?

When hospitals file these liens, they are proceeding in the dark and taking unnecessary risks to the detriment of the injured Vermonter.

Billing Medicare/Medicaid in third party liability cases:

There is a general misunderstanding by hospital administrators that they are not allowed to bill insurance, including Medicaid or Medicare, if there is a liable third party. This is incorrect and a misinterpretation of Medicaid and Medicare regulations.

Medicaid and Medicare routinely pay for medical services even if there is a pending liability claim.

² Centers for Medicare and Medicaid Services (CMS) policy memo (SE17018)

Medicaid and Medicare anticipate making these payments and have robust subrogation departments who work with attorneys like me to ensure they are properly reimbursed as the law requires.

The confusion by hospitals likely comes from language in these regulations that deal with priority of payments and coordination of benefits. Essentially, these regulations provide that if the injured person has already been paid and there is money available from the liability carrier for these medical bills, then the hospital should collect that first. However, in reality, liability carriers do not pay medical expenses *as they come due*. They regularly wait years before paying out on claims and do so as a lump sum, in exchange for a settlement release.

Section 411.52 of title 42, chapter IV, subchapter B of the Medicare regulations is titled “basis for conditional Medicare payments in liability cases.” The regulation states Medicare will pay hospital bills for an injury victim if (1) the liability insurer will not pay promptly; or (2) the beneficiary has not filed a claim for liability insurance benefits. Pay promptly is defined as 12-days.

In *Evanston Hospital v. Hauck*, the United State Court of Appeals for the Seventh Circuit held that the federal regulations that refer to Medicaid as a payor of last resort gives the state governments, not hospitals, permission to seek reimbursement out of future third party settlement. The Court stated “a tort judgment five years in the future can in no sense be considered the kind of certain, prompt third-party payment Congress had in mind when it wrote the Medicare statute. “

In summary, hospitals are permitted to submit bills to Medicaid and Medicare even if there could be a future third party liability claim. Medicaid and Medicare will pay the hospitals, and then will work with attorneys like me on collecting any amounts due if/when there is a future settlement.

Unlike with a Vermont hospital lien, Medicaid, Medicare, and private health insurance only recover back these payments if the patient actually receives funds from the legally responsible party. If a patient, for whatever reason, is unable to recover from the liability carrier, there is no lien to be repaid and the medical bills remain paid.

Vermont’s lien law has no such provisions in place and a patient’s medical bills can remain unpaid if there is no recovery, forcing the hospital to write off the charges or the patient to seek bankruptcy.

What the amendment intends to fix:

The proposed amendment seeks to address these issues with several changes.

It requires that hospitals accept a patient’s health insurance if they can bill that insurer.

The amendment requires hospitals to share in the costs the patient incurs to collect the hospital’s lien.

The amendment incorporates fairness principals by capping the hospital's lien to 25% of net settlement.

This makes it more likely that the injured Vermonter can recover all their damages, such as lost wages or pain and suffering.

Importantly, this amendment still allows hospitals to pursue a lien if the patient is uninsured, which is consistent with the original purpose of these kinds of law.

However, the amendment adds protections for the patient and hospital against the many unknown factors that exists in any potential liability claim.

This new law would recognize the importance of patient choice and giver Vermonters more control over their finances by allowing them to reap the full benefits of the health coverage they pay for.

Thank you.